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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

ELSE WILLHEIM and RANDOLPH PHILLIPS,
Petitioners,

v.

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners d/b/a MURCHISON BROTHERS; and INVESTORS DIVERSIFIED SERVICES, INC.,
Respondents,

INVESTORS MUTUAL, INC.,
Defendant.

BRIEF OF RESPONDENTS MURCHISON AS TO THEIR SEPARATE GROUNDS OF OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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June 9, 1965

INDEX

	PAGE
Introduction	1
Question Presented	1
Statement	2
POINT I—THE PETITION SHOULD BE DENIED BECAUSE NO CONTROVERSY PRESENTLY EXISTS BETWEEN PETITIONERS AND RESPONDENTS MURCHISON	4
POINT II—THIS COURT SHOULD NOT GRANT THE PETITION BECAUSE THERE IS NO REVIEWABLE QUESTION UNDER THE INVESTMENT COMPANY ACT	5
Conclusion	8

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This brief is submitted on behalf of respondents John D. Murchison and Clint W. Murchison, Jr. To avoid duplication of the brief of respondent Investors Diversified Services, Inc. ("IDS") in opposition to the Petition for Certiorari, these respondents subscribe to and adopt the arguments made therein. Accordingly, this brief is confined to the Murchisons' separate grounds of opposition.

Question Presented

Petitioners have presented no question which, if answered favorably to them, would require reversal of the District Court's judgment in favor of respondents Murchi-

son. Consequently, we believe there is no controversy existing between petitioners and respondents Murchison.

Should this suggestion as to the absence of jurisdiction be erroneous, however, the following question arises as to the independent grounds supporting the judgment below in favor of these respondents:

> Does the Investment Company Act impose liability for the allegedly unlawful performance of investment advisory and underwriting contracts upon persons who were not parties to those contracts, who did not receive payments thereunder and who neither directly nor indirectly caused the allegedly unlawful performance thereof?

Statement

Petitioners' complaint alleged that purchases of Alleghany Corporation ("Alleghany") securities by participants in a proxy solicitation contest in the spring of 1961, when coupled with the vote of the independent shareholders of Alleghany which gave the victory to the insurgents, effected an "assignment" of the investment advisory and underwriting contracts then in effect between IDS and Investors Mutual, Inc. ("Mutual") (Cmpt., ¶¶ 19, 25, 27 and 28, 4-7c).*

The complaint further alleged that as a consequence of such "assignment", the contracts were terminated at least since May 1, 1961 (Cmpt., ¶ 29, 7c); that despite such termination IDS and Mutual continued to perform them (Cmpt., ¶¶ 30-35, 7-8c); that the directors of Mutual acted upon advice of counsel to the effect that there had been no "assignment" (Cmpt., ¶ 38, 8-9c); and that such acts by IDS and Mutual *and the Murchisons,* "as controlling

*References to a, b or c are to petitioners', IDS' and the Murchison's appendices, respectively, in the Court below.

persons, with their nominees, of Alleghany Corporation and IDS" were in violation of Sections 15, 36, 37, 47(b), 48 and 49 of the Investment Company Act (Cmpt., ¶ 36, 8c).

Petitioners made no claim against the Murchisons independent of the foregoing claim of unlawful contractual performance by IDS and Mutual.

Moreover, petitioners in no way pleaded or proved facts to support their contention that respondents Murchison are, or should be, liable under the Investment Company Act for the allegedly unlawful performance by IDS and Mutual. It is undisputed:

(i) That the Murchisons at no time between September 19, 1960 and July 18, 1961 directly or indirectly caused Mutual or IDS to continue the performance of the contracts here in question.

(ii) That the Murchisons had no "profits" from either Mutual or IDS, had no contracts with and received no moneys from either of those corporations (other than dividends they and other IDS stockholders received) owned by them.

(iii) That Mutual and IDS, under their respective Boards of Directors, which were in no way responsive to the Murchisons, continued to perform the contracts during the period subsequent to the alleged "assignment".

(iv) That Mutual's directors considered the question of "assignment" now posed by petitioners and upon the advice of Mutual's counsel elected to continue Mutual's performance.

In sum, therefore, petitioners seek an "accounting" for the Murchisons' "profits" and Mutual's "damages" when the Murchisons undisputedly had no "profits" and did not cause Mutual to perform to its "damage".

ARGUMENT

POINT I

THE PETITION SHOULD BE DENIED BECAUSE NO CONTROVERSY PRESENTLY EXISTS BETWEEN PETITIONERS AND RESPONDENTS MURCHISON.

Each of the questions presented in the petition attempts to assert an issue as to whether the insurgents' victory in the Alleghany proxy contest in the spring of 1961 resulted in an assignment with a consequent automatic termination of the investment advisory and underwriting contracts in effect at that time between IDS and Mutual.

If any of petitioner's questions is answered favorably to petitioners, then the courts ultimately might find that the continued performance of such contracts by those corporations was unlawful and that IDS might be liable in damages to Mutual for such unlawful performance.

But, it is undisputed that the Murchisons received no moneys from Mutual and did not cause Mutual or IDS to continue to perform the contracts after the alleged assignment.*

Because the petition does not raise any question as to their liability under the Investment Company Act and in no way attacks the judgment in favor of the Murchisons in light of the undisputed facts, there is and can be no controversy existing between the Murchisons and petitioners.

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*The Murchisons' defenses were presented by the answer (18c) and by a separate, simultaneous motion for summary judgment (20c). Petitioners did not controvert the Murchisons' statement of facts in support of the motion (29c-32c) and the District Court so noted in granting summary judgment (10a).

POINT II

THIS COURT SHOULD NOT GRANT THE PETITION BECAUSE THERE IS NO REVIEWABLE QUESTION UNDER THE INVESTMENT COMPANY ACT.

Petitioners conceded below that it is the continued performance of investment advisory and underwriting contracts after an assignment rather than the assignment itself which is unlawful.* Indeed, in the petition they so characterize their complaint as one "based on the alleged illegal performance of two contracts" (Pet'n. p. 5). This concession and characterization is appropriate since there is no provision in the Investment Company Act which makes an assignment itself unlawful, *Securities Exchange Commission* v. *Insurance Securities, Inc.*, 146 F. Supp. 778 (N. D. Cal.), aff'd 254 F. 2d (9th Cir.) cert. den. 358 U. S. 823 (1958).**

Thus, the Murchisons, whose participation in the Alleghany proxy contest allegedly gave rise to the *lawful* "assignment", have no connection with the alleged violation of the

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*Section 15(d) of the Investment Company Act provides:

"(d) It shall be unlawful for any person—

"(1) to serve or act as investment adviser of a registered investment company . . . after assignment [of the contract] . . . by the person acting as investment adviser thereunder; or

"(2) as principal underwriter for a registered open-end investment company to offer for sale, sell, or deliver after sale and a security of which such company is the issuer, pursuant to a written contract . . . after assignment thereof . . . by the person acting as principal underwriter thereunder."

**In *Insurance Securities, supra,* the SEC itself, while unsuccessfully attacking the assignment there in question because the price exceeded asset value, pointed out that assignment "at asset value, *is proper,* even though the advisory and underwriting agreement is thereby terminated under § 15(a)(4), 15 U. S. C. § 80a-15(a)(4)."

Investment Company Act pleaded by petitioners, namely, the continued performance of the contracts by IDS and Mutual after the alleged "assignment".

Assuming that Mutual and IDS continued to perform their contracts after an assignment, there is no basis in the pleading, in the undisputed facts or in the Investment Company Act for holding the Murchisons responsible for such continued performance. They were, of course, not parties to the contracts and received no payments thereunder. They were neither officers nor directors of Mutual at any time (¶ 15, 27c; ¶ 1, 29c). Moreover, Clint W. Murchison, Jr., did not become a director of IDS until more than two months after the alleged assignment (¶ 15, 27c; ¶ 3, 29c), a period in which IDS continued to perform. Significantly, the complaint does not even allege that the Board of Directors of either Mutual or IDS, or for that matter, Alleghany, was caused to act or was influenced, directly or indirectly, by the Murchisons with respect to such continued contract performance by IDS and Mutual.*

In the absence of causation by them, there is no basis in the Act for Murchison liability. Thus, the only pertinent provision of the Act imposing liability upon those who

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*Indeed the complaint itself concedes the absence of Murchison causation (Cmpt. ¶ 38, 8c):

> "Demand upon the board of directors of defendant Investors Mutual, Inc. to bring this action would be futile since its counsel have advised the company, contrary to plaintiffs' contentions herein, that there has not been an assignment and termination of its investment advisory and underwriting contracts as pleaded herein * * *."

By thus giving consideration to the problem which later became the subject of appellants' complaint and determining, on the basis of the advice of counsel, that Mutual's contracts with IDS were valid and had not been assigned, Mutual's directors conclusively foreclosed any claim that the Murchisons caused Mutual's continued performance under those contracts.

do not themselves violate the Act is drawn solely in terms of causation (§ 48, 15 U. S. C. § 80a-47):

> *"Procuring violation of subchapter; obstructing compliance*
>
> 'It shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this subchapter * * *.' "

Here it is undisputed the Murchisons did not cause Mutual or IDS to continue the allegedly unlawful performance. Hence there is no reviewable question as to Murchison liability under the Investment Company Act.

While petitioners present no question in this Court as to any other basis of Murchison liability, the complaint does allege the Murchisons are liable as "controlling persons" of Allegheny hence of IDS hence of Mutual. There is no provision in the Act to support the pleading. The Investment Company Act, like the Holding Company Act but unlike the Securities Act and the Securities Exchange Act of 1934, does not impose liability upon controlling persons.*

Lastly, there is no claim by petitioners that the Murchisons were parties to any unlawful contractual performance or owed or breached any duty to Mutual, in whose right this action was begun. Petitioners have offered no authority

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*The Securities Act of 1933 imposes liability on the basis of "control" (15 U. S. C. § 77o) and the Securities Exchange Act on the basis of "control" or "causation" (15 U. S. C. § 78t). On the other hand, the Public Utility Holding Company Act (15 U. S. C. § 79z-1) and the Investment Company Act (15 U. S. C. § 80a-47) impose liability only on the basis of causation.

Thus, Congress not only has drawn a distinction between liability based upon control and liability based upon causal connection, but it has been selective with respect to the segments of the securities industry in which each test should be applied.

of any sort for holding persons in such circumstances liable under the Investment Company Act or any other statutory or decisional law.

There is, therefore, no question of importance for review by this Court. Nothing in the Act, the complaint, the undisputed facts or the petition presents any issue as to the propriety of the District Court's judgment in favor of these respondents.

CONCLUSION

For the reason stated above, the petition for a writ of certiorari to review the judgment and unanimous affirmance of in favor of respondents Murchison should be denied.

Respectfully submitted,

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